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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CARNIVAL CRUISE LINES, INC.,
Petitioner,
v.
SUSAN MORTON and WILLIAM MORTON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. FEDERAL ADMIRALTY LAW DOES NOT IMPOSE ABSOLUTE LIABILITY FOR A CREWMEMBER'S TORTS OUTSIDE THE SCOPE OF EMPLOYMENT

In their brief in opposition, Respondents accept Petitioner's contention that this case is controlled by *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887), a case never cited by the court below. *See* Opp. Br. 2, 4. Respondents differ from Petitioner only in their interpretation of *Brockett*. Respondents' interpretation of *Brockett*, however, disregards the plain language of that decision.

Respondents' characterization of *Brockett* as imposing absolute liability for the torts of a crewmember, whether or not committed within the scope of employment, is based on the Court's statement that a common carrier

"undertakes absolutely to protect [passengers] against the misconduct of its own servants engaged in executing the contract." Opp. Br. 4-5 (citing *Brockett*, 121 U.S. at 645). Respondents argue that the phrase "servants engaged in executing the contract" refers to "personnel manning the conveyance . . . even if the employee is acting *outside* the scope of employment." Opp. Br. 5 (emphasis in original).

By focusing on a single ambiguous phrase in *Brockett*, and arbitrarily resolving the ambiguity in their favor, Respondents fail to account for the numerous other explicit references in *Brockett* to the "scope of employment" restriction. These references, many of which appear on the same page as the passage relied upon by Respondents, make clear that vicarious liability in admiralty—like vicarious liability in shoreside common law—is limited to an employee's actions within the scope of employment. *See* 121 U.S. at 645 ("within the scope of their general employment, or when in the discharge of special duties imposed upon them"); *id.* ("while transacting the company's business, and when acting within the general scope of their employment"); *id.* ("done in the course of his employment"); *id.* ("in the conduct of his business"); *id.* at 646 ("enforcement of reasonable regulations established by the carrier for the conduct of its business"); *id.* at 649 ("while assisting another servant in enforcing [the ship's] regulation as to deck passengers").

II. THE SHORESIDE COMMON CARRIER CASES CITED BY RESPONDENTS ARE INAPPLICABLE AND CONTRARY TO ESTABLISHED MARITIME PRECEDENT

Respondents cite two railroad cases, *Stewart v. Brooklyn & C.R.R. Co.*, 90 N.Y. 591 (1882) and *New Orleans & N.E.R.R. v. Jopes*, 142 U.S. 18 (1891), to support their view that a cruise line is absolutely liable for any assault by a crewmember, whether or not the act was

within the scope of employment.[1] Both cases involved shoreside assaults wherein the courts relied upon the special fare-paying status of the plaintiffs in applying a strict liability standard. However, this Court in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), found that maritime law, in its effort to promote simplicity, uniformity and practicality, rejects such traditional shoreside common law distinctions which have "produced confusion and conflict." *Id.* at 630-31.

As *Kermarec* recognized, maritime law is distinct from traditional common law and is molded by unique policy considerations. "The inconsistent and diverse results reached by courts which have tried to apply to the facts of shipboard life common-law distinctions . . . reinforce the conclusion here reached." *Id.* at 632 n.10. While a cruise ship may be a common carrier in the colloquial sense that it carries members of the public, such status does not, *a fortiori*, warrant application of land-based principles of carrier liability.

Kermarec rejected the determination of the standard of care based on classes and subclasses of plaintiffs and instead mandated a simple and practical standard of care applicable to all shipboard torts. The only recognized exception was crewmembers or other employees who receive special protection by virtue of the hazards of their work. *Kermarec* expressly abolished the common law distinction between licensees and other invitees. *See* 358 U.S. at 631-32.

Respondents now urge this court to resurrect the very distinctions abolished in *Kermarec*, holding that "passengers" are a separate class of plaintiffs, apart from other victims of crime. The result is that a cruise line

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[1] Likewise, the only treatise cited by Respondents that analyzes the vicarious liability question in detail, *American Jurisprudence 2d*, does so only in the context of railroad and taxi cases, and does not discuss the issue as a matter of admiralty law. *See* Opp. Br. 13-14; 14 Am. Jur. 2d § 908 n.2 (1964).

will be absolutely liable to a passenger (*i.e.*, a business licensee), but not absolutely liable to any other visitor, independent contractor, fellow employee or person who might befall the same unfortunate fate.

As a matter of public policy, it makes little sense to offer a higher level of protection to passengers than to others who may legitimately board a cruise ship. While Respondents attempt to classify the distinction as being based on the status of the tort (intentional v. negligent), the only authority cited is that passengers aboard trains and buses have under the common law been entitled to a higher degree of care, including strict liability for assaults. Under maritime law, however, the circuit courts have consistently held that the *Kermarec* "reasonable care under the circumstances" standard of care is applicable to *all* passenger actions against cruise lines. *See* Pet. 12-14.

Even if the maritime standard of vicarious liability is to be based on the shoreside standard, as Respondents urge, the applicable standard should be the one applicable to shoreside activities that are analogous to those on a cruise ship. A modern cruise ship is a floating city with hundreds of workers, such as photographers, food servers, chefs, dancers, musicians, security officers, bartenders, casino dealers, receptionists, telephone operators, television repairmen, doctors, nurses, children's counsellors, and maids. Courts have found hotels cannot be held strictly liable for sexual assaults by on-duty hotel dining stewards. *Pittard v. Four Seasons Motor Inn, Inc.*, 688 P.2d 333 (N.M. App. 1984). Cities have not been held strictly liable for sexual assaults by on-duty police officers. *Mary M. v. City of Los Angeles*, 225 Cal. App. 3d 666 (1988), *rev'd on other grounds*, 54 Cal. 3d 202, 814 P.2d 1341 (1991). Hospitals have not been held strictly liable for sexual assaults of minor patients by staff nurses. *Maguire v. Montana*, 254 Mont. 178, 835 P.2d 755 (1992); *G.L. v. Kaiser Found. Hosp.*, 88 Or. App. 528, 746 P.2d 731 (1987), *aff'd*, 306 Or. 54, 757 P.2d 1347 (1988). While the cruise operator is bound to exercise

reasonable care in the selection, supervision, and retention of employees, a rule of absolute liability for criminal acts is contrary to those shoreside situations that are truly analogous.

III. THE RULE OF ABSOLUTE LIABILITY ADOPTED BY THE NINTH CIRCUIT WILL HAVE SERIOUS ADVERSE EFFECTS

As indicated in our petition, a rule of absolute liability in federal admiralty law will have important public policy implications. Pet. 16-19. Respondents' principal argument in response, that a small number of cases will be affected by the rule, is factually unfounded; it is based on an extrapolation from the number of *legitimate* claims and multiplied by *Carnival's* market share. Obviously, the number of admiralty claims in state and federal courts encompasses legitimate and illegitimate claims. Further, an extrapolation from Carnival's experience is meaningless if, as Carnival believes, its safety record is superior to the industry average. The more telling figure, cited in our petition, is the 2,752 maritime personal injury claims filed in federal courts alone in the year ending September 30, 1992.[2] Pet. 18.

In addition, the historical number of illegitimate claims is not static, but can be expected to increase in response to the more expansive rule of liability. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1263, 1289 (1991). That development will necessarily translate into higher costs to be passed along to passengers. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1527 (1991) ("passengers who purchase tickets containing a forum selection clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that

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[2] *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: Annual Report of the Director* 28 (1992).

the cruise line enjoys . . ."). In addition, as the more expansive rule of liability creates an incentive for false accusations against crewmembers, those false accusations will place a painful cloud over the crewmembers involved.

Finally, absolute liability will deter ship owners from cooperating with criminal investigations of assaults against passengers. By making a cruise line liable in *every* case of an assault by a crewmember, not just in cases that involve negligent hiring, retention, or supervision, a rule of absolute liability may reduce the extent to which a cruise line cooperates with criminal investigations of shipboard assaults. Any effort by the line to uncover and preserve evidence of such crimes would be rewarded by civil liability against the line.[3]

IV. THE PROPER DEVELOPMENT OF ADMIRALTY DOCTRINE BY THIS COURT IS IMPORTANT TO THE DECISION OF CASES BY LOWER COURTS IN A RANGE OF FIELDS BESIDES ADMIRALTY

While review of the Ninth Circuit's decision is important simply to provide guidance to lower courts in deciding admiralty cases, the Ninth Circuit's decision—and this Court's review of the decision—has significance far beyond the confines of admiralty. The scope of vicarious liability for an employee's conduct is, of course, an issue in shoreside common law claims as well as in admiralty. Contrary to Respondents' contention, then, if the decision below is permitted to stand, it is simply not true that it "is of major import only to the two respondents." Opp. Br. 17.

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[3] Nor is there any merit to Respondents' suggestion that admiralty law should impose absolute liability because shipowners are better able to insure against the costs of civil liability for unauthorized, unforeseen shipboard criminal assaults. Opp. Br. 16. This claim directly conflicts with the well-established rule that a shipowner is not an absolute insurer of passengers' safety. *See Stokes v. Saltonstall*, 38 U.S. (13 Pet.) 181, 191 (1839); *The City of Panama*, 101 U.S. 453, 462 (1880); *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 64-65 (2d Cir. 1988).

The Ninth Circuit's decision does not establish absolute liability in areas other than admiralty, but the admiralty decisions of federal courts frequently influence the course of parallel issues in shoreside law. For example, this Court's decisions concerning the validity of forum selection clauses in maritime contracts, *Carnival Cruise Lines, Inc. v. Shute, supra,* and *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), are frequently relied upon for their persuasive value by lower courts considering forum selection clauses in non-maritime contracts. *See, e.g., Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1218-19 (3d Cir.) (forum selection clause in reinsurance agreement), *cert. denied*, 112 S. Ct. 302 (1991); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757, 758 (7th Cir. 1992) (forum selection clause in warranty); *Stauffacher v. Bennett*, 969 F.2d 455, 458-59 (7th Cir.) (forum selection clause in investment contract), *cert. denied*, 113 S. Ct. 814 (1992); *Morgan v. McNiff*, 797 F. Supp. 325, 326 (S.D.N.Y. 1992) (choice of law clause in promissory notes). The potential for the decision below to influence lower courts to apply absolute liability in non-maritime personal injury cases thus provides a further practical ground for review by this Court.

CONCLUSION

This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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